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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 EKO BRANDS. LLC,

9 Plaintiff,

10 v.

11 ADRIAN RIVERA MAYNEZ  
12 ENTERPRISES INC; ADRIAN  
13 RIVERA,

14 Defendants.

C17-894 TSZ

MINUTE ORDER

15 The following Minute Order is made by direction of the Court, the Honorable  
16 Thomas S. Zilly, United States District Judge:

17 (1) Defendants' Motion for Summary Judgment, docket no. 33, is DENIED.  
18 Summary judgment is "disfavored" in trademark infringement cases, but "may be entered  
19 when no genuine issue of material fact exists." *Survivor Media, Inc. v. Survivor Prods.*,  
20 406 F.3d 625, 630 (9th Cir. 2009). The parties dispute material facts relevant to the  
21 issues of liability and damages in this action for trademark infringement and unfair  
22 competition, making summary judgment improper. *See AMF, Inc. v. Sleekcraft Boats*,  
23 599 F.2d 341, 348-49 (9th Cir. 1979) (establishing flexible eight-factor test for likelihood  
of confusion in trademark disputes).

(2) Defendants' Motion to Exclude the Testimony of Catherine Carr, docket  
no. 34, is DENIED in part and GRANTED in part. Plaintiff describes two topics on  
which Carr will testify: (1) the strength of the Ekobrew mark and brand and (2) ARM's  
selection of the Eko or Eco marks. The Court is satisfied that with respect to the first  
topic, strength of the Ekobrew mark, Carr's specialized knowledge will help the trier of  
fact understand the evidence and determine facts in issue, is based on sufficient facts or  
data, is the product of reliable principles and methods, and that Carr has reliably applied

1 the principles and methods to the facts of this case. *Daubert v. Merrell Dow*  
2 *Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *United States v. Hankey*, 203 F.3d 1160,  
3 1168-69 (9th Cir. 2000) (applying *Daubert* factors to non-scientific expert); *see also*  
4 *Messick v. Novartis Pharmaceuticals Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014) (noting  
5 that although Rule 702 “should be applied with a liberal thrust favoring admission . . . it  
6 requires that expert testimony be both relevant and reliable”) (internal quotation marks,  
7 alterations, and citations omitted). That Carr did not conduct consumer surveys or  
8 perform a consumer study as part of her report does not warrant exclusion of her  
9 testimony. *Comm. For Idaho’s High Desert, Inc. v. Yost*, 92 F.3d 814, 822 (9th Cir.  
10 1996) (observing that consumer surveys are probative evidence, but are not required to  
11 prove likelihood of confusion). Carr based her opinion on a combination of her  
12 experience in brand development and management and on a review of the competing  
13 products’ websites and social media accounts, product reviews, internet search analytics,  
14 and by asking various retailers about their reusable, single-serve coffee products. Carr  
15 Report, docket no. 35-1, ¶ 10. In light of these facts and data, the Court does not  
16 conclude there is “simply too great an analytical gap between the data and the opinion  
17 proffered.” *General Electric v. Joiner*, 522 U.S. 136, 146 (1997). To the extent there are  
18 gaps or limitations in Carr’s analysis regarding the strength of the marks, those issues go  
19 to the weight—not the admissibility—of her testimony. With respect to the second  
20 topic—ARM’s selection of various marks—the Court GRANTS Defendant’s motion.  
21 Plaintiff has not demonstrated that Carr’s conclusions on this topic are based on sufficient  
22 facts or data or are the product of reliable principles or methods. On this topic, the  
23 analytical gap between ARM’s decisionmaking process—which Carr did not observe—  
and Carr’s conclusions is “simply too great.” *Joiner*, 522 U.S. at 146.

(3) The Parties are DIRECTED to meet and confer within 14 days of this  
minute order and provide the Court with a status report regarding when this case can be  
set for trial and how much time will be required for trial.

(4) The Clerk is directed to send a copy of this Minute Order to all counsel of  
record.

Dated this 8th day of November, 2018.

William M. McCool  
Clerk

s/Karen Dews  
Deputy Clerk